STATE OF MICHIGAN

COURT OF APPEALS

LORI L. STONE, f/k/a LORI L. GILLER, Plaintiff-Appellee, v	UNPUBLISHED February 7, 2012
TROOPER STEVEN TEMELKO, Defendant, and	No. 301991 Washtenaw Circuit Court LC No. 10-000501-NI
TROOPER NICOLE HISEROTE, Defendant-Appellant.	

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Trooper Nicole Hiserote appeals as of right from the trial court's order denying her motion for summary disposition. We reverse and remand for entry of a judgment in favor of Hiserote consistent with this opinion.

Troopers Steven Temelko and Hiserote received a dispatch regarding a motorcycle personal injury accident in the area of Hadley Road and North Territorial in Lyndon Township. The troopers responded and proceeded to the crash site in separate patrol vehicles. Temelko drove in the lead, and Hiserote followed closely behind. Both vehicles had their emergency lights and sirens activated.

There were two different routes the troopers could have taken to get to the crash site. The first route was to take M-52 north to Werkner Road and turn right, which was the shortest distance but had numerous tight curves. The second option was to continue north on M-52 to North Territorial, which was a longer distance, but had fewer curves. Hiserote and Temelko did not discuss which route they were going to take prior to responding to the dispatch.

As the troopers drove north on M-52, traffic thinned and the road widened, so the troopers increased their speed. As the troopers approached Werkner Road, they were traveling approximately 65 miles an hour. During her deposition, Hiserote testified that she perceived that they were going to continue northbound on M-52 and drive to North Territorial because Temelko

was not in the right turn lane. Hiserote then saw Temelko brake hard. Hiserote testified that she did not perceive that Temelko was "going to do an in-line brake and make the turn like [they have] been trained to do . . . ." Rather, she thought they were going to continue north, but that there was something in front of Temelko that was causing him to brake. Hiserote was gaining on Temelko quickly, so she started braking and cut into the right turn lane to try and avoid a collision. At that point, Temelko attempted to turn right onto Werkner Road.

Hiserote was unable to stop, and her vehicle struck the right quarter panel of Temelko's vehicle. The impact caused Temelko's vehicle to strike the front end of plaintiff's vehicle, which was facing west on Werkner Road. Hiserote's vehicle then struck the rear quarter panel of plaintiff's vehicle and the front end of a black Chrysler Sebring, which was also facing west on Werkner Road. Hiserote's vehicle then proceeded to run off the roadway and down an embankment before coming to a final stop.

An investigation revealed that the accident was preventable and that Hiserote's actions contributed to the accident. Specifically, it was determined that Hiserote was following Temelko at an unsafe distance, which caused her to be unable stop in time to avoid the collision. Hiserote acknowledged that she believed that the accident was preventable and that she was at fault.

Plaintiff filed suit against Hiserote and Temelko, alleging that both troopers were negligent in the operation of their patrol vehicles and that plaintiff suffered serious injuries as a result. Hiserote moved for summary disposition under MCR 2.116(C)(7), arguing that she was immune from liability under the Governmental Tort Liability Act (GTLA), MCL 691.1407. Hiserote argued that she was immune from tort liability because her conduct, even if negligent, did not amount to gross negligence. Plaintiff argued that summary disposition was premature because discovery was not complete and asserted that a question of fact existed regarding whether Hiserote was grossly negligent. The trial court heard arguments and denied Hiserote's motion from the bench.[1]

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). The applicability of governmental immunity is a question of law that we review de novo on appeal. *Co Rd Ass'n v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010).

On appeal, Hiserote argues that she is immune from plaintiff's claims because her conduct did not amount to gross negligence. We agree.

[1] The trial court entered a stipulated order dismissing plaintiff's claims against Temelko with prejudice.

"The governmental immunity act provides 'broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]'" *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006), quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). Under the GTLA, governmental employees are immune from tort liability "if they were acting within the scope of their authority, were 'engaged in the exercise or discharge of a governmental function,' and their conduct did not 'amount to gross negligence that is the proximate cause of the injury or damage.'" *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004), quoting MCL 691.1407(2)(b) and (c).

"The determination whether a governmental employee's conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition." *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7). "The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Instead, gross negligence suggests

> almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Id.*]

Plaintiff argues that there are several indications of gross negligence on the part of Hiserote: (1) Hiserote drove in tandem with Temelko without first confirming the route, knowing that turn signals do not work when the emergency lights are activated; (2) Hiserote followed at an unsafe distance; (3) Hiserote admitted that she may have been driving outside her 80 percent driving ability; (4) Hiserote admitted that she failed to realize that Temelko was making a right turn; (5) Hiserote admitted to veering into the turn lane to avoid a rear-end collision; (6) Hiserote admitted to using a high rate of speed; and (7) Hiserote admitted that she was at fault for the crash. Plaintiff argues that this evidence shows sufficient indicia of gross negligence to create a genuine issue of material fact. We disagree.

When viewing all the evidence in a light most favorable to plaintiff, we are unable to conclude that Hiserote operated her vehicle in a grossly negligent manner. There is simply no evidence that Hiserote acted in a manner that showed a substantial lack of concern for whether an injury resulted. Rather, all the evidence indicates that Hiserote operated her vehicle in a negligent manner by maintaining an unsafe distance between Temelko's vehicle. However, evidence that Hiserote operated her vehicle in a negligent manner "does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at 122. An objective observer could not "conclude, reasonably, that [Hiserote] simply did not care about the safety or welfare

of those in [her] charge." *Tarlea*, 263 Mich App at 90. Therefore, summary disposition was appropriate.

Further, we reject plaintiff's argument that summary disposition was premature because discovery had not concluded. As a general rule, summary disposition is premature if it is granted before discovery is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). However, summary disposition is appropriate if further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position. *Id.*

Plaintiff emphasizes that she had outstanding discovery requests. Specifically, plaintiff references a letter that was put in Hiserote's personnel file following the accident. Plaintiff argues that this letter, as well as other documents in Hiserote's personnel file, could indicate that Hiserote violated her training or policies of the Michigan State Police. Plaintiff argues that this evidence could be an important indication of gross negligence. We disagree.

Even if we assume that Hiserote's personnel file contains evidence that she violated her training or rules and regulations of the Michigan State Police, plaintiff stands to gain very little from such evidence. "In Michigan, the violation of administrative rules and regulations is evidence of negligence[.]" *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 235; 463 NW2d 236 (1990). Therefore, a violation of a rule or regulation would be relevant to the issue of negligence. *Id.* "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at 122. Thus, even if Hiserote's personnel filed contains evidence that she violated her training or specific rules and regulations of the Michigan State Police, such evidence would only be relevant to the issue of ordinary negligence and would not create a question of fact concerning gross negligence. As such, further discovery does not present a fair likelihood of uncovering factual support for plaintiff's position. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292.

Reversed and remanded for entry of judgment in favor of Hiserote consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck